SUBJECT-MATTER INDEX.

ARGUMENT.

PAGE

The authorities cited by respondent do not sustain his contentions, inasmuch as none of them denies the power of the Circuit Court of Appeals by virtue of Section 701 R. S. to endue the District Court with a new power over the cause 1, 2, 3, 4

TABLE OF CASES CITED.

Ballew *v.* United States, 160 U. S. 187 ..... 3, 4

Hazeltine *v.* Wildermuth, 35 F. (2nd) 733 5

Kendall *v.* Ewart, 259 U. S. 139 2

Roemer *v.* Simon, 91 U. S. 149 3

Russell *v.* Southard, 12 How. 138 4

TABLE OF STATUTES.

Section 701 Revised Statutes 1, 2, 3, 4

17 Statutes at Large, 196 2

1 Statutes at Large, 73, 85 4

IN THE

Supreme Court of the United States

REALTY ACCEPTANCE CORPORATION,

Petitioner,

v.

HENRY G. MONTGOMERY,

Respondent.

REPLY BRIEF FOR PETITIONER.

The brief of respondent is principally devoted to a contention which we do not dispute. We admit that the power of a District Court over a cause submitted to it expires upon the perfecting of a writ of error to the Circuit Court of Appeals or the expiry of the term of the District Court. Our contention is that the Circuit Court of Appeals by virtue of Section 701 R. S. has the power to endue the District Court with a new power over the cause.

We, therefore, deem it appropriate that we reply only to so much of respondent's brief as deals with the powers of an appellate tribunal under Section 701 R. S.

Respondent at page 21 of his brief contends that the language of Section 701 R. S., namely, "or may direct such further proceedings to be had by the inferior court as the justice of the case may require," affords no statutory sanction for the order of the Court of Appeals of June 28, 1930, authorizing the District Court to consider the newly discovered evidence. Yet no reason for such contention, other than his own

view, is advanced. The action of the Court of Appeals in so authorizing the District Court, and the action of the District Court under such authority in opening its judgment, is here conclusive that "the justice of the case" required such action in order to prevent gross injustice. No other statute, nor any other wording in Section 701 R. S. is suggested by respondent as qualifying the ordinary plain meaning of the language in question. The natural construction thereof is helped by the title of Section 701 R. S. It is not entitled an act to change the procedure in the Supreme Court, or to amplify or to restrict the power of that Court in cases before it on appeal, but its title reads

> *"An act to further the administration of justice"* (17 Stat. at L., p. 196).

The contention of the respondent, as set out in his brief on page 15, is that the Court of Appeals can only reverse, modify or affirm the judgment of the District Court. Logically, this contention carries him to the utterly untenable position that, upon a hearing, the Appellate Court must confine its action to the decree appealed from and is without power to direct proceedings in the District Court. If the power of the Court of Appeals is so confined, it would have no authority to direct further proceedings in the District Court; yet it is the universal practice of such courts to direct new trials, modify judgments, direct accountings and generally do what justice requires. For instance, in the case of *Kendall* v. *Ewart*, this Court, on appeal and acting on its powers under Section 701 R. S., remanded the cause for the revision of the decree, cancellation of deeds, and also for an accounting for rents and profits, indemnification against existing liens and for further proceedings in accordance with the opinion.

Kendall v. *Ewart*, 259 U. S. 139.

Ballew v. *United States*, 160 U. S. 187, was cited by petitioner on the primary point that Section 701 R. S. applied to the Federal Courts of Appeal as well as to the Supreme Court. We think it likewise is in conflict with the narrow construction placed on said section by respondent in that it not only reversed the judgment of the lower court but likewise directed that court to enter judgment on one count and take other proceedings on the other count. In this case, Chief Justice WHITE traces the history of the power of courts of appeal at common law, by statute in England and by statute in the United States, and after quoting Section 701 R. S. as the same appeared in the Act of June 1, 1872, he states the conclusion of the Court to be

> "From this and from a review of the legislation on the subject of the powers conferred upon this Court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on writ of error to take such action as the ends of justice not only in civil but in criminal cases might require."

It is significant that, in dealing with Section 701, the Chief Justice makes no allusion to the cases of *Roemer* v. *Simon* and *Russell* v. *Southard*, discussed *infra*.

Roemer v. *Simon*, 91 U. S. 149, is respondent's chief reliance. An analysis of the case will not show the pertinency respondent claims for it. It appears that a decree in a patent cause entered by the Trial Court had been appealed to the Supreme Court. Before any argument of such appeal, a motion to set aside the decree below and for a rehearing was filed, and denied. The two points actually decided were (1) that the Supreme Court could not *on motion and before hearing the cause* set aside the decree below; and (2) that any application to it for leave for a rehearing should be made by the court below and not by a party. All else in the short

opinion was *obiter*. At a later time the Supreme Court heard the appeal on the merits and disposed of it. It is submitted that this Court would not have used the *obiter* language concerning the uselessness of remanding because of the expiration of the Trial Term below, without expressly distinguish ng or somehow expressly viewing as inapplicable the plain language of Section 701 R. S., if it had undertaken to construe it. It is manifest that, in this opinion, it merely envisaged the power of the lower court if the motion to remand was granted prior to the hearing and before this Court acted on the appeal. It did not purport to define the powers of the *Appellate Court* under said section.

The decision in *Russell* v. *Southard*, 12 How. 138, cited on page 16 of respondent's brief, is without any application here. It simply stated the practice of an equity court that no evidence not before the court below could be received on the hearing of an appeal. Also, this decision was long prior to the enactment of Section 701 R. S.

This decision construed the Act of September 24, 1789, c. 20, 1 Stat. 73, 85, which was set out in the case of *Ballew* v. *United States, supra*, as follows:

> "that when a judgment or decree shall be reversed in a Circuit Court, such court shall proceed to render such judgment or pass such decree as the District Court should have rendered or passed, and the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision."

Manifestly, it has no bearing upon Section 701 enacted some twenty years later.

It is, therefore, submitted that nothing in respondent's brief indicates that this Court has ever undertaken to limit the powers of an appellate tribunal to deal with manifest wrong as the ends of justice might require.

The case of *Hazeltine* v. *Wildermuth*, 35 F. (2nd) 733, not cited in our main brief, fully sustains our contention.

CHARLES F. CURLEY,
R. RANDOLPH HICKS,
Counsel for Petitioner.

FILE COPY

FILE
JAN 9
CHARLES

No. 314. October Term, 1931.

IN THE

SUPREME COURT OF THE UNITED STATES

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY,
Respondent.

REPLY BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

CHARLES F. CURLEY,
R. RANDOLPH HICKS,
Counsel for Petitioner.

APPEAL PRINTING CO., 32 THAMES ST., NEW YORK CITY

FILE COPY

FILED
SEP 10 193
CHARLES ELMORE CR
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 314

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

ROBERT H. RICHARDS,
AARON FINGER,
CARL EHLERMANN,
THOMAS J. CRAWFORD,
Attorneys for Respondent.

PRINTED IN THE UNITED STATES BY C. G. BURGOYNE, INC., 110 GREENWICH STREET, NEW YORK

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Statement	1
Argument	5
I—The decision of the Circuit Court of Appeals that the District Court of Delaware had no jurisdiction to vacate and set aside, on June 30, 1930, the judgment in plaintiff's favor entered May 11, 1929 during the March Term 1929 of said District Court, was clearly correct and in strict conformity with the applicable decisions of this Court	5
II—The pendency in the Circuit Court of Appeals of petitioner's appeal from the judgment did not authorize the Circuit Court of Appeals to remand the case to permit the District Court to vacate its own judgment and grant petitioner's motion for a new trial after the expiration of the term of the District Court at which said judgment was entered	9

PAGE

III—The question whether the issue of the quantum of plaintiff's damages is a separable issue is not material here, inasmuch as the Circuit Court of Appeals did not reverse the judgment and grant a new trial for errors committed below, said judgment having been vacated by the District Court itself when it had no jurisdiction over the cause 17

Conclusion 18

Citations.

Angle *vs.* United States (4th Cir.) 162 Fed. 264 15

Ballew *vs.* United States, 160 U. S. 187.... 16
Baltimore S. S. Co. *vs.* Phillips, 9 Fed. (2nd) 902 14
Bank of United States *vs.* Moss, 6 How. 31 5
Bronson *vs.* Schulter, 104 U. S. 410..... 5

Cameron *vs.* M'Roberts, 3 Wheat 591..... 5

D. L. & W. R. R. Co. *vs.* Rellstab, 276 U. S. 1 ..... 5, 7

Exporters *vs.* Butterworth-Judson Co., 258 U. S. 365 17

Frankel *vs.* Woodrough, 7 Fed. (2nd) 796.. 10

Gasoline Products Co. *vs.* Champlin Refining Co., 283 U. S. 494 17

PAGE

Hickman *vs.* Fort Scott, 141 U. S. 415.... 5
Hudson *vs.* Guestier, 7 Cranch. 1 5
Hume *vs.* Bowie, 148 U. S. 245..... 5

Marden *vs.* Campbell P. & Mfg. Co. (1st Cir.) 67 Fed. 809 14
Martin *vs.* United States (5th Cir.) 17 Fed. (2nd) 972 15
In re Metropolitan Trust Co., 218 U. S. 312 5
Michigan Insurance Bank *vs.* Eldred, 143 U. S. 293 17

O'Connell *vs.* United States, 253 U. S. 142 17

Phillips *vs.* Negley, 117 U. S. 665..... 5

Roemer *vs.* Simon, 91 U. S. 149 12

Scott *vs.* United States (5th Cir.) 165 Fed. 172 15
Ex parte Sibbald, 12 Pet. 488 5
Strand *vs.* Griffith (9th Cir.) 135 Fed. 739 13

Tubman *vs.* B. & O. R. R. Co., 190 U. S. 38 5

United States *vs.* Mayer, 235 U. S. 55 .....5, 6, 7, 8, 10, 11, 12

Wetmore *vs.* Karrick, 205 U. S. 141..... 5
Whitney *vs.* Dick, 202 U. S. 132 10

Statutes.

Act of March 3, 1891 Sec. 2, 6, 26 Stat. L. 826, 828 10

Rule 38 (5) (b) of Circuit Court of Appeals 16

Section 701 of the Revised Statutes (Title 28, Sec. 876 U. S. C. A.) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. .....

REALTY ACCEPTANCE CORPORATION,
Petitioner,
v.
HENRY G. MONTGOMERY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Third Circuit (R., pp. 70-75) has not yet been officially reported.

JURISDICTION.

The orders sought to be reviewed (R., 76, Appendix, p. 320) were entered July 6, 1931. The petition for writ of certiorari was filed August 19, 1931. The jurisdiction of this court rests upon the provisions of section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT.

The petitioner herein (defendant below) seeks to have this Court review on certiorari two orders of the Circuit Court of Appeals for the Third Circuit entered herein on July 6, 1931. By one of said orders (R., p. 76) the Circuit Court of Ap-

peals reversed an order of the District Court of Delaware entered June 30, 1930 (R., p. 59) whereby said court at its June Term 1930 purported to set aside its own judgment entered in plaintiff's favor on May 11, 1929 (R., p. 4) at the March Term 1929 of said court, and to grant a new trial upon alleged newly discovered evidence.

The inaccuracy in plaintiff's testimony, upon which petitioner based its motion for a new trial, related to the amount of plaintiff's capital contribution to a joint speculative venture upon which he had embarked with another after his wrongful discharge from petitioner's employment (R., pp. 4d-4l). Plaintiff's testimony that the arrangement called for an equal contribution of capital by him was inaccurate in that it required him to contribute only one-fourth of the capital. Plaintiff's testimony in that regard was based entirely on his recollection of the contents of a written instrument, the arrangement having been covered by a written agreement (Appendix, p. 101) which petitioner did not even ask plaintiff to produce.

The judgment in plaintiff's favor was a final judgment which had been affirmed by the Circuit Court of Appeals in a *per curiam* opinion on January 15, 1930 (See, p. 319, Transcript on *Appeal of Realty Acceptance Corporation, Defendant-Appellant* v. *Henry G. Montgomery, Plaintiff-Appellee,* No. 4216, October Term 1929, attached as Appendix to Transcript of Record on this appeal) and the District Court's order vacating said judgment and granting a new trial on newly discovered evidence concededly was entered long after the expiration of the March Term 1929 of the District Court at which said judgment had been entered. The petitioner had on March 25, 1930 obtained an order (R., p. 5) from the Cir-

cuit Court of Appeals granting petitioner leave to apply to the District Court to have that court request the Circuit Court of Appeals to remand the cause so that the District Court could vacate the judgment and reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment, and staying further proceedings in the cause until after the District Court heard petitioner's motion, and, if allowed, until the District Court should have finally acted upon the matters raised thereby.

By the second of said orders sought to be reviewed (Appendix, R., p. 320) the Circuit Court of Appeals granted plaintiff's motion and vacated its own *per curiam* order which it had entered June 28, 1930, at the request of the District Court, and which had dismissed petitioner's appeal "without prejudice" and had remanded the cause "to give the District Court a free hand" (R., p. 74, line 21) to grant a new trial.

The Circuit Court of Appeals, in entering the orders complained of, filed a reasoned opinion (R., pp. 70-75) holding that the District Court of Delaware was without jurisdiction at its June 1930 Term, to vacate its own judgment in plaintiff's favor entered May 11, 1929 at the March Term 1929 of said court, and that by its order of remand of June 28, 1930, the Circuit Court of Appeals was "without power to confer original jurisdiction upon or restore lost jurisdiction to the District Court with respect to a new trial after the term" (R., p. 74). It therefore held that the order of the District Court vacating said judgment should be reversed and that its own order of remand should be vacated to permit the release of the mandate of affirmance in accordance with its order of affirmance entered January 15,